

HOUSE BILL NO. 446

INTRODUCED BY J. POMNICHOWSKI

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE OPENCUT MINING ACT; REQUIRING WATER MONITORING IN CERTAIN SITUATIONS; REQUIRING WATER RUNOFF CONTROL; PROVIDING LEGAL ACTION FOR DAMAGE TO WATER SUPPLY; PROVIDING FOR A WRIT OF MANDAMUS; ALLOWING AWARDING OF ATTORNEY FEES; AND AMENDING SECTION 82-4-434, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 82-4-434, MCA, is amended to read:

"82-4-434. Plan of operation -- requirements. (1) The department shall immediately submit a plan of operation received in a permit or permit amendment application involving expansion of the permit area to the state historic preservation office for evaluation of possible archaeological or historical values in the area to be mined.

(2) The department shall accept a plan of operation if the department finds that the plan complies with the requirements of this part and the rules adopted pursuant to this part and that after the opencut operation is completed, the affected land will be reclaimed to a productive use. Once the plan of operation is accepted by the department, it becomes a part of the permit but is subject to annual review and amendment by the department. Any amendment by the department must comply with the provisions of 82-4-436(2).

(3) The department may not accept a plan of operation unless the plan provides:

(a) that the affected land will be reclaimed for one or more specified uses, including but not limited to forest, pasture, orchard, cropland, residence, recreation, industry, habitat for wildlife, including food, cover, or water, or other reasonable, practical, and achievable uses;

(b) that whenever the opencut operation results in a need to prevent acid drainage or sedimentation on or in adjoining lands or streams, catchments, ponds, or other reasonable devices to control water drainage and sediment will be constructed and maintained, provided the devices will not interfere with other landowners' rights or contribute to water pollution;

(c) that soil and other suitable overburden will be salvaged and replaced on affected land, when required by the postmining land use, after completion or termination of that particular phase of the opencut operation. The depth of soil and other suitable overburden to be placed on the reclaimed area must be specified in the plan.

1 (d) that grading will result in a postmining topography conducive to the designated postmining land use;

2 (e) that waste will be buried on site in a manner that protects water quality and is compatible with the
3 postmining land use or will be disposed of off site in accordance with state laws and rules;

4 (f) that all access, haul, and other support roads will be located, constructed, and maintained in a manner
5 that controls and minimizes erosion;

6 (g) that the opencut operation will be conducted to avoid range and wildland fires and spontaneous
7 combustion and that open burning will be conducted in accordance with suitable practices for fire prevention and
8 control. Approval of the plan for fire prevention and control under this part does not relieve the operator of the duty
9 to comply with the air quality permitting and protection requirement of Title 75, chapter 2.

10 (h) that archaeological and historical values on affected lands will be given appropriate protection;

11 (i) that except for those postmining land uses that do not require vegetation, each surface area of the
12 mined premises that will be disturbed will be revegetated when its use for the opencut operation is no longer
13 required;

14 (j) that seeding and planting will be done in a manner to achieve a permanent vegetative cover that is
15 suitable for the postmining land use and that retards erosion;

16 (k) that reclamation will be as concurrent with the opencut operation as feasible and will be completed
17 within a specified length of time;

18 (l) that surface water and ground water will be given appropriate protection, consistent with state law,
19 from deterioration of water quality and quantity that may arise as a result of the opencut operation;. The
20 requirements of this subsection (3)(l) include but are not limited to:

21 (i) for an opencut operation that may intercept ground water, the installation of at least two monitoring
22 wells before the permit is issued;

23 (ii) for an opencut operation that may intercept surface water, at least two water samples submitted to
24 the department before the permit is issued;

25 (iii) after a permit is issued, submission of a monthly monitoring report on a form provided by the
26 department for any opencut operation that was subject to subsection (3)(l)(i) or (3)(l)(ii); and

27 (iv) provisions for the control of surface water runoff.

28 (m) that noise and visual impacts on residential areas will be minimized to the degree practicable through
29 berms, vegetation screens, and reasonable limits on hours of operation; and

30 (n) that any additional procedures, including monitoring, that are necessary, consistent with the purposes

1 of this part, to prevent significant physical harm to the affected land or adjacent land, structures, improvements,
2 or life forms will be implemented.

3 (4) If reclamation according to the plan of operation has not been completed in the time specified, the
4 department, after 30 days' written notice, shall order the operator to cease mining and, if the operator does not
5 cease, may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action
6 to enjoin further operation and may sue for damages for breach of the conditions of the permit, for payment of
7 the performance bond, or for both.

8 (5) (a) At any time during the term of the permit, the operator may for good reason submit to the
9 department a new plan of operation or amendments to the existing plan, including extensions of time for
10 reclamation.

11 (b) The department may approve the proposed new plan of operation or amendments to the existing plan
12 if:

13 (i) the new plan of operation or amendments comply with the requirements of this section; and

14 (ii) (A) the operator has in good faith conducted opencut operations according to the existing plan of
15 operation; or

16 (B) it is highly improbable that reclamation will be successful unless the existing plan of operation is
17 replaced or amended.

18 (6) The permit, plan of operation, and amendments accepted by the department are a public record and
19 are open to inspection."
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21 **NEW SECTION. Section 2. Suit for damage to water supply.** (1) An owner of an interest in real
22 property who obtains all or part of a supply of water for domestic, agricultural, industrial, or other legitimate use
23 from an underground source other than a subterranean stream having a permanent, distinct, and known channel
24 may sue an operator to recover damages for contamination, diminution, or interruption of the water supply
25 proximately resulting from an opencut operation.

26 (2) (a) Prima facie evidence of injury in a suit under this section is established by the removal of materials
27 or disruption of the surface overlying the aquifer from designated ground water areas pursuant to Title 85, chapter
28 2, part 5.

29 (b) If the area is not a designated ground water area, an owner may file a complaint pursuant to
30 subsection (3).

(3) An owner of water rights adversely affected may file a complaint detailing the loss of water in quality and quantity with the department. Upon receipt of this complaint the department shall:

(a) investigate the complaint using all available information including monitoring data gathered at the mine site;

(b) require the operator to install monitoring wells or other practices that may be needed to determine the cause of water loss, if there is a loss, in terms of quantity or quality;

(c) issue within 90 days a written finding specifying the cause of the water loss, if there is a loss, in terms of quantity or quality;

(d) order the operator, subject to Title 85, chapter 2, to replace the water immediately on a temporary basis to provide the needed water and within a reasonable time replace the water in like quality, quantity, and duration if the loss is caused by the opencut operation; and

(e) order the suspension of the operator's permit for failure to replace the water until the operator provides substitute water.

(4) A servient tract of land is not bound to receive surface water contaminated by opencut mining on a dominant tract of land, and the owner of the servient tract may sue an operator to recover the damages proximately resulting from the natural drainage from the dominant tract of surface waters contaminated by opencut mining on the dominant tract.

(5) This section and [section 3] do not create, modify, or affect any right, liability, or remedy other than as expressly provided.

NEW SECTION. Section 3. Mandamus. (1) A resident of this state or any person having an interest that is or may be adversely affected, with knowledge that a requirement of this part or a rule adopted under this part is not being enforced or implemented by a public officer or employee whose duty it is to enforce or implement the requirement or rule, may bring the failure to enforce to the attention of the public officer or employee by a written statement under oath that must state the specific facts of the failure to enforce the requirement or rule. Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed in 45-7-202.

(2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the statement to enforce or implement the requirement or rule, the resident or person having an interest that is or may be adversely affected may bring an action of mandamus in the district court of the county in which the land is

1 located. The court, if it finds that a requirement of this part or a rule adopted under this part is not being enforced,
2 shall order the public officer or employee whose duty it is to enforce the requirement or rule to perform the
3 officer's or employee's duties. If the officer or employee fails to obey the order, the public officer or employee must
4 be held in contempt of court and is subject to the penalties provided by law.

5 (3) Any person having an interest that is or may be adversely affected may commence a civil action on
6 the person's own behalf to compel compliance with this part against any person for the violation of this part or
7 any rule, order, or permit issued under this part. However, the action may not commence:

8 (a) prior to 60 days after the plaintiff has given notice in writing to the department and to the alleged
9 violator; or

10 (b) if the department has commenced and is diligently prosecuting a civil action to require compliance
11 with the provisions of this part or any rule, order, or permit issued under this part. Any person may intervene as
12 a matter of right in the civil action. This section does not restrict any right that any person may have under any
13 statute or common law to seek enforcement of this part or the rules adopted under this part or to seek any other
14 relief.

15 (4) Any person who is injured in person or property through the violation by any operator of any rule,
16 order, or permit issued pursuant to this part may bring an action for damages, including reasonable attorney and
17 expert witness fees, only in the county in which the opencut operation complained of is located. This subsection
18 does not affect the rights established by or limits imposed under Title 39, chapter 71.

19 (5) The court, in issuing any final order in any action brought pursuant to subsection (3), may award
20 costs of litigation, including attorney and expert witness fees, to any party whenever the court determines that
21 the award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought,
22 require the filing of a bond or equivalent security in accordance with the Montana Rules of Civil Procedure.

23
24 **NEW SECTION. Section 4. Codification instruction.** [Sections 2 and 3] are intended to be codified
25 as an integral part of Title 82, chapter 4, part 4, and the provisions of Title 82, chapter 4, part 4, apply to [sections
26 2 and 3].

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